

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

PAUL PHILIP HAMILTON

Claimant

VS.

ARBY'S ROAST BEEF RESTAURANT

Respondent

AND

NATIONAL UNION FIRE INSURANCE COMPANY

Insurance Carrier

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Docket No. 241,239

ORDER

Respondent and its insurance carrier appealed the March 8, 1999 preliminary hearing order entered by Administrative Law Judge Bruce E. Moore.

ISSUES

This is a claim for a December 30, 1998 back injury and any additional injury that occurred while claimant continued to work through January 12, 1999. After a preliminary hearing conducted on March 4, 1999, the Judge awarded claimant both medical and temporary total disability benefits.

The respondent and its insurance carrier contend the Judge erred. They argue that claimant committed fraud in procuring employment with respondent by intentionally misrepresenting his physical condition. Also, because the fraud allegedly had a direct causal relationship to the back injury, they argue the employment contract is void and claimant is barred from receiving workers compensation benefits.

Conversely, claimant contends that he did not misrepresent his physical condition and, even if he had fraudulently misrepresented his physical abilities, he would not be barred from receiving benefits.

The only issue before the Board on this appeal is whether intentional misrepresentation is a valid defense that can be asserted in a claim for benefits under the Workers Compensation Act.

FINDINGS OF FACT

After reviewing the record compiled to date, for purposes of preliminary hearing the Board finds:

1. On September 21, 1998, Mr. Hamilton started working for an Arby's Roast Beef Restaurant in Salina, Kansas, as an assistant manager. His duties included scheduling and supervising employees, counting and handling money, cleaning the store, serving customers, inventory control, and receiving product.
2. On approximately December 30, 1998, Mr. Hamilton injured his low back while lifting and moving 40-pound boxes of roasts in the store's freezer. The back injury occurred while Mr. Hamilton was working for Arby's and doing assigned duties.
3. After the December 1998 accident, Mr. Hamilton continued working for Arby's until January 12, 1999, when he sought medical treatment and was taken off work. But after the December 1998 incident, he did no lifting.
4. Since as early as 1984, Mr. Hamilton has experienced back problems. In 1989 Mr. Hamilton injured his back and had back surgery. After another back injury in 1996, he had a second back surgery.
5. During Arby's interview process, Mr. Hamilton advised the company that he had undergone two back surgeries. And he also advised that he had either a 10- or 20-pound lifting restriction. But despite the lifting restriction, he advised that he believed he could do the work at Arby's because he had been lifting 40 to 50 pounds for another employer and believed he had strengthened his back.

CONCLUSIONS OF LAW

1. The preliminary hearing order should be affirmed.
2. Arby's and its insurance carrier contend Mr. Hamilton intentionally misrepresented his physical condition and abilities and, therefore, should be denied workers compensation benefits. The Board disagrees. First, for preliminary hearing purposes the Board finds that Mr. Hamilton did not misrepresent either his impairment or physical abilities. Second, misrepresentation is not a defense to a claim for benefits.
3. The Workers Compensation Act is complete within itself. Because there is no statutory authority, the courts have held that laches is not a defense in a claim for workers compensation benefits.¹ Using that same rationale, misrepresentation is not a defense.

¹ Burnside v. Cessna Aircraft Co., 24 Kan. App. 2d 684, 951 P.2d 1315 (1998).

4. Before the Workers Compensation Fund's liability was significantly limited by the 1993 legislative amendments, the act provided that either whole or partial liability could be assessed against the fund when a worker misrepresented or concealed any fact reasonably related to the claim for compensation.² The act did not bar workers from receiving benefits when they misrepresented their impairment or disability, nor did it automatically shift responsibility to the Fund. Instead, the act allowed employers to pursue either whole or partial reimbursement from the Fund, depending upon the facts surrounding the accident and disability.

5. When the legislature terminated the Fund's liability for accidents sustained by impaired or handicapped employees, it did not amend the act to include misrepresentation as a defense to a claim.

WHEREFORE, the Appeals Board affirms the March 8, 1999 preliminary hearing order entered by Judge Bruce E. Moore.

IT IS SO ORDERED.

Dated this ____ day of April 1999.

BOARD MEMBER

c: Joseph Seiwert, Wichita, KS
Terry J. Torline, Wichita, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director

² K.S.A. 44-567(c).